RECEIVED
DEC 17 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

1979

CHRISTOPHER BURROUGHS,
Petitioner,

VS.

STATE OF GEORGIA,
Respondent.

NO. 79-5804

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of Georgia entered on September 5, 1979, with one Justice dissenting, which reversed decisions of the Georgia Court of Appeals and the trial court setting aside his Simple Battery conviction.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia, The State v. Burroughs, Case 34916 is set out in the Appendix at A9 and is reported at 244 Ga. 288 (1979). The opinion of the Court of Appeals of Georgia is reported at 149 Ga. App. 183, 254 S.E. 2d 144 (1979), and is appended hereto at A4. The opinion of the State Court of Fulton County is unreported, but the Order

of the trial judge setting aside the conviction is set out in the Appendix at A1.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on September 5, 1979 (Appendix A9). Petitioner filed a motion for a rehearing, which the Supreme Court of Georgia denied on September 25, 1979 (Appendix A19).

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3), Petitioner having asserted below, and asserting here, deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
> (U.S.C.A. Const. Amend V)

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
> (U.S.C.A. Const. Amend XIV, Sec. 1)

This case involves also the following provisions of the Code of Georgia:

Ga. Code Ann. Sec. 26-1304

Simple Battery

> A person commits simple battery when he either (a) intentionally makes physical contact of an insulting or provoking nature with the person of another or (b) intentionally causes physical harm to another. A person convicted of simple battery shall be punished as for a misdemeanor.
> (Acts 1968, pp. 1249, 1281.)

The following provision of the Atlanta City Code, the entire text of which is set out in the Appendix at A 20-21, is involved in this case:

Atlanta City Code Sec. 17-3001.10

Disorderly Conduct

> It shall be unlawful for any person within the corporate limits of the city to violate any of the following subsections of this section:
> * * * (10) Any person who shall by acts of violence interfere with another's pursuit of a lawful occupation; * * * *
> (1977 Atlanta Code of Ordinances Sec. 17-3001.10)

QUESTION PRESENTED

Whether the conviction of Petitioner in municipal court for Disorderly Conduct (violent interference with the lawful occupation of another) bars a subsequent prosecution and conviction in a state court for Simple Battery?

STATEMENT OF THE CASE

Petitioner, a twenty-two year old, indigent, black male was arrested at a police barricade on a public street in Atlanta, Georgia, and was charged with Simple Battery, Refusal to Disperse and Disorderly Conduct, a municipal ordinance offense, relating to violent interference with another's pursuit of a lawful occupation. It was alleged that he hit and kicked a police officer, and refused to disperse when told to do so. He pleaded not guilty to the city ordinance charge; was tried, convicted and sentenced in Atlanta Municipal Court for that offense. The Municipal Court also bound over the Simple Battery and Refusal to Disperse charges to the State Court of Fulton County for trial and disposition.

The case was tried before the state court with a jury on October 26, 1978, with the result that guilty verdicts were returned on the Simple Battery charge and also on the Refusal to Disperse charge. Both the municipal court conviction for Disorderly Conduct and the state court conviction for Simple

Battery were supported by the same evidence which established that petitioner and some friends were gathered on the street, that petitioner refused to move when told to do so by a police officer and that he hit and kicked the police officer.

Prior to trial in the State Court of Fulton County, petitioner, through his court appointed attorney, filed and argued a Motion to Dismiss based on constitutional and statutory double jeopardy protections. The trial court reserved decision until after trial and then set aside petitioner's Simple Battery conviction but not his conviction for Refusal to Disperse. The State appealed, and the Court of Appeals affirmed unanimously, finding a statutory double jeopardy bar to the state court prosecution and punishment for Simple Battery.

On application of the State, the Supreme Court of Georgia granted certiorari and found that Georgia's double jeopardy statute was inapplicable to successive municipal and state court prosecutions, and held further that the two convictions did not involve the same offense, with one Justice dissenting. A motion for Rehearing was denied with one Justice dissenting.

HOW THE FEDERAL QUESTION WAS RAISED BELOW

At the trial level, petitioner moved to dismiss the State Court of Fulton County prosecution based on statutory grounds, state constitutional grounds and federal constitutional grounds. The trial court and a unanimous Court of Appeals of Georgia

found for petitioner on the basis of the statutory grounds, and thus did not reach the federal question. The Supreme Court of Georgia reversed, and in so doing reached the federal question holding that petitioner's rights under the federal constitution had not been violated.

REASONS FOR GRANTING THE WRIT

Petitioner, at the time of his arrest, was a twenty-two year old, indigent black male with a sixth grade education, whose only employment was as an occasional laborer. He struck and kicked a police officer. For this offense, he was convicted twice: first in municipal court on a charge of Disorderly Conduct (violent interference with the lawful occupation of another); and then again in state court for Simple Battery.

The proof given to show petitioner guilty of Disorderly Conduct was that he struck and kicked a police officer and thereby interfered with his lawful occupation. The proof given to show petitioner guilty of Simple Battery was that he struck and kicked a police officer, causing him harm or to take offense.

To cause a police officer harm or to cause him to take offense at an unauthorized contact must necessarily interfere with the pursuit of his lawful occupation. Thus, the state crime is completely subsumed and contained in the city ordinance. There was one act, one intent and one volition, followed by two prosecutions and two convictions. There was no element of proof required by the second prosecution that was not required by the first prosecution. This is the same situation addressed in Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 LEd 2d 187 (1977), and is similar to Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184 (1970). It is analogous also to the situation found in Illinois v. Vitale, Number 78-1845, on which this Court has granted Certiorari.

WHEREFORE, for the reasons set forth in the Petition herein, petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

LAWRENCE T. GIRARD
Esquire
Suite 700 - Lenox Center
3355 Lenox Road, N.E.
Atlanta, Georgia 30326
(404) 266-2727

STEVE W. REIGHARD
Esquire
Suite 700 - Lenox Center
3355 Lenox Road, N.E.
Atlanta, Georgia 30326
(404) 266-2727

APPENDIX

1. Order of Trial Judge — A 1

2. Opinion of Court of Appeals of Georgia — A 4

3. Decision of Supreme Court of Georgia — A 9

4. Notice of Denial of Motion for Rehearing Supreme Court of Georgia — A 19

5. Text of Sec. 17-3001 (Disorderly Conduct) 1977 Code of Ordinances of the City of Atlanta — A 20

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	)	
	)	
v.	)	ACCUSATION NO. 190121, 190122
	)	
CHRISTOPHER BURROUGHS	)	

ORDER

This case was tried before the Court with a jury on October 26, 1978. Prior to trial, defendant filed and argued a Motion to Dismiss based on double jeopardy. The Court withheld ruling pending the presentation of evidence. Upon the close of the evidence, the Court denied the Motion.

After the return of the verdicts of guilty on each charge, defendant orally moved to set aside the verdicts and for acquittal of defendant, on the same grounds as were advanced in the Motion to Dismiss. The Court heard argument and took the case under advisement.

Upon a consideration of all of the evidence in the case, including the testimony of the witnesses at the trial as well as the copy of the City of Atlanta Municipal Court citation and City Ordinance, the Court GRANTS the Motion as to the Simple Battery charge in Accusation No. 190121 and DENIES the Motion with respect to the refusal to disperse charge in Accusation No. 190122.

The Court is of the opinion that, based on the representations by the State and the evidence produced at trial, the "acts of violence" required to be proved in the Municipal Court charge of Section 17-3001(10) were the acts constituting the Simple Battery on the police officer. That is, the hitting of the police officer with defendant's arm and the kicking of the police officer constituted

the "acts of violence." Violence is defined in Black's Law Dictionary as "unjust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage or fury." The clenching of defendant's fists at his side, and the profane retort would not of themselves constitute acts of violence, so the proof of the Simple Battery in the Municipal Court was essential to the government's case there. Consequently, the Simple Battery charge was subsumed in the prosecution in the Municipal Court. It was in this sense an included crime as described in Ga. Code Sec. 26-505(a). Thus his conduct here amounts to a multiple prosecution for the same conduct. He may be prosecuted twice, but he may be convicted for only one crime, since, under the facts of this case, the Simple Battery was included in the charge and proof of Disorderly Conduct.[1] It is also arguable that the present prosecution for Simple Battery was barred by the first prosecution in the Municipal Court, because although it is a different crime, it was a crime involving the same conduct, as prohibited by Ga. Code Sec. 26-507(b)(1). Although as a matter of law the two crimes could require proof of a fact not required on the other prosecution (the State would not necessarily have to prove a Simple Battery to prove an "act of violence", and the State would not have to prove Interference With Lawful Occupation in order to prove Simple Battery), the facts of this case clearly show that the Simple Battery had to be proved as constituting the "acts of violence."[2] Since the State did not concede that these were the facts at the outset and before trial, it was necessary to present all of the facts upon which it relied.

The outcome is different with respect to the charge of Refusal to Disperse. That crime was completed fully when defendant refused to leave after the officer at least once, and apparently twice, instructed him and his companions to go around the block to reach their destination. That refusal preceded the "acts of violence",

and the commission of the crime was complete before defendant took aggressive action. The crime of Refusal to Disperse, Ga. Code Sec. 26-2606, was complete when there was a union of joint operation of act or omission to act (refusal to disperse) and intention. Ga. Code Sec. 26-601.[3]

Defendant shall be returned to Court for sentencing at the earliest possible time.

A copy hereof shall be sent to counsel for each party.

This the 31st day of October, 1978.

Dorothy T. Beasley

DOROTHY T. BEASLEY
Judge, State Court of Fulton County

---

[1] The Municipal Court and the State Court represent the same sovereign. Barrett v. State, 123 Ga. App. 210 (1971); Waller v. Florida, 397 U.S. 387 (1969).

[2] Barber v. State, 146 Ga. App. 523 (1978). See also Brown v. Ohio, 432 U.S. 161 (1977).

[3] As to double jeopardy generally, see Keener v. State, 238 Ga. 7 (1976), ...ire v. State, 143 Ga. App. 315 (1977).

57309. THE STATE v. BURROUGHS (CHRISTOPHER) W-40

FEB22 1979

Webb, Presiding Judge.

Burroughs was arrested and charged with violations of § 17-3001.10 (disorderly conduct - violent interference with another's pursuit of a lawful occupation) of the 1977 Code of Ordinances of the City of Atlanta, and Criminal Code § 26-1304 (simple battery on a police officer). After conviction of the city ordinance violation, the municipal court bound over the other charges to the State Court of Fulton County. Prior to trial his appointed attorney filed and argued a motion to dismiss based upon double jeopardy, which was denied at the close of the evidence. After return of verdicts of guilty the defendant orally moved to set aside the verdicts and for acquittal on the same grounds of double jeopardy. The court heard argument and took the case under advisement. Subsequently, concluding that under the facts of this case the simple battery was included in the charge and proof of the disorderly conduct, and therefore "in this sense an included crime as described in Code. § 26-505 (a)," it granted the motion and the state appeals. We affirm.

1. We agree that under the facts of this case--that is, the hitting and kicking of the police officer by Burroughs--based on the representations of the state and the evidence produced at the state court trial, the acts of violence required to be proved in the municipal court

violation of the city ordinance were the acts constituting the simple battery on the police officer. Consequently, the simple battery charge became a crime included in the municipal court prosecution, for which more than one conviction is prohibited by Code Ann. § 26-506 (a) (1).

In addition, Code Ann. § 26-506 (a) (2) provides that an accused may not be convicted of more than one crime if "the crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct." Under Code Ann. § 26-1304, "A person commits simple battery when he either (a) intentionally makes physical contact of an insulting or provoking nature with the person of another or (b) intentionally causes physical harm to another." The Atlanta disorderly conduct ordinance sets forth 13 specific instances of prohibited conduct, most of which would constitute simple battery.[1]

Finally, Code Ann. § 26-507 bars second prosecutions for the same conduct as a procedural matter so as to prevent undue harrassment or threat. See State v. Eastvei, 232 Ga. 316 (206 SE2d 475) (1974). Thus Code Ann. § 26-507 (b) (1) would bar further prosecution since proof that Burroughs struck and kicked the police officer "would support a conviction either of disorderly conduct or of simple battery, and each prosecution would not 'require proof of a fact not required on the other prosecution.'[Cits.]" Barber v. State, 146 Ga. App. 523, 524 (246 SE2d 517) (1978).

---

[1] The question of whether the ordinance violates the uniformity clause of the Georgia Constitution (Art. I, Sec. II, Para. VII; Code Ann. § 2-407) or Code Ann. § 89-1310 (2) has not been raised and therefore cannot be considered here. Cf., Lambert v. City of Atlanta, Ga. (S 39e33, decided November 21, 1978).

The state argues that a violation of a municipal ordinance is not a crime as defined by Criminal Code § 26-201[2] and cannot be used to invoke double jeopardy prohibitions to prosecution. In Waller v. Florida, 397 U.S. 387 (90 SC 1184, 25 LE2d 435) (1970) the Supreme Court considered the asserted power of two courts within one state to place the accused on trial for the same alleged crime. The Florida District Court of Appeals had rejected the appellant's argument that he had twice been put in jeopardy because prior to his conviction of grand larceny in the state court he had been convicted by the municipal court of an included offense. Noting that the Florida Constitution declared that the judicial power of the state was vested "in a supreme court . . . and such other courts, including municipal courts. . . as the legislature may from time to time ordain and establish," the court held that "a 'dual sovereignty' theory is an anachronism and the second trial constituted double jeopardy violative of the Fifth and Fourteenth Amendments to the United States Constitution." 397 U.S. at 393 and 395.

In Georgia the judicial powers of the state are also vested in a Supreme Court "and such other courts as have been or may be established by law." Ga. Const. Art. VI, Sec. I, Para. I (Code Ann. § 2-3001), and "the power to create local city courts is recognized in the constitution."

---

[2] "No conduct constitutes a crime unless it is described as a crime in this Title or in another statute of this State . . . "

Clark v. Eve, 134 Ga. 788, 789 (4) (68 SE 598) (1910). Moreover, "Georgia courts have long recognized that a person may not be convicted by both the State and a municipality for the same crime. Menken v. City of Atlanta, 78 Ga. 668 (2 SE 559) ; Callaway v. Mims, 5 Ga. App. 9 (62 SE 654); Morris v. State, 18 Ga. App. 684 (90 SE 361); Watkins v. Simmons, 179 Ga. 162 (175 SE 493). The test for determining if there is a fatal identity between the crime and the ordinance is whether the ordinance contains an ingredient or element, essential to the city's peace but not essential to the State offense, or if the offense created by the ordinance lacks some element essential to the State crime. Menken v. City of Atlanta, supra; Morris v. State, supra." Barrett v. State, 123 Ga. App. 210, 211 (180 SE2d 271) (1971).

The state's argument here was not even raised in Barber v. State, 146 Ga. App. 523, supra, which involved a double jeopardy defense to charges of disorderly conduct in the Recorder's Court of the City of Albany and simple battery in the State Court of Dougherty County, and we find it to be without merit.

2. The state also insists that we should reverse because a motion to set aside a verdict is inappropriate in a criminal case. As noted above, a hearing on Burroughs' motion to dismiss preceded the trial and it was denied. The motion was renewed immediately following the verdict, and again denied. After the oral motion to set aside, the court studied for several days arguments and citations, which were based on the same grounds advanced in the motion to dismiss. Concluding that the motion to dismiss had been meritorious, the motion to set aside was granted. In such a case we will

apply the rule that where the action of the trial court is legally correct, it will be affirmed regardless of the reason assigned. The State v. Brittain, 147 Ga. App. 626 (SE2d) (1978).

Judgment affirmed. Banke and Underwood, JJ, concur.

DECIDED: SEP 05 1979

34916 THE STATE v. BURROUGHS

HALL, Justice.

Burroughs was convicted in Atlanta Municipal Court of disorderly conduct.[1/] He was later convicted in the State Court of Fulton County of simple battery[2/] and refusal to disperse.[3/] Both the municipal and state convictions were supported by the same evidence which established that Burroughs and some friends were gathered on the street, that Burroughs refused to leave when asked to do so by a police officer and that he then hit and kicked the police officer. Burroughs

---

1. 1977 Atlanta Code of Ordinances § 17-3001.10 provides that a person "who shall by acts of violence interfere with another's pursuit of a lawful occupation" is guilty of disorderly conduct.

2. Code Ann. § 26-1304 provides, "A person commits simple battery when he either (a) intentionally makes physical contact of an insulting or provoking nature with the person of another or (b) intentionally causes physical harm to another. A person convicted of a simple battery shall be punished as for a misdemeanor."

3. Code Ann. § 26-2606 provides, "A person in a gathering who refuses to obey the reasonable official request or order of a peace officer or fireman to move for the purpose of promoting the public safety by dispersing those gathered in dangerous proximity to a fire or other emergency, is guilty of a misdemeanor."

interposed a plea of double jeopardy at the second prosecution, contending that the prosecution was barred either by the statutory provision against double jeopardy, Code Ann. Chap. 26-5, or by the constitutional double jeopardy prohibition. The trial court reserved decision until after trial and then set aside Burroughs' simple battery conviction but not his conviction for refusal to disperse. The Court of Appeals affirmed, finding a statutory double jeopardy bar to the prosecution and punishment for simple battery. We granted certiorari and find that Georgia's double jeopardy statute is inapplicable to successive municipal and state court prosecutions. Where successive municipal and state prosecutions are involved, a criminal defendant's rights are controlled solely by the state and federal constitutions. No constitutional bar to the second prosecution and punishment exists in this case.

1. Code Ann. § 26-601 defines a crime as a "violation of a statute of this State . . ." The Committee Notes state that the section "eliminates the possibility of confusion as to what conduct is a crime within the meaning of the Code by making it clear that the Code refers only to violations of 'a statute of this State,' thereby excluding municipal ordinances and administrative regulations." We conclude that in creating the expanded statutory protection against being twice placed in jeopardy for the same offense, Estevez v. State, 232 Ga. 316 (206 SE2d 475)

(1974), the legislature intended those statutes, Code Ann. §§ 26-505, 506 and 507, to affect only successive prosecutions for state crimes and not successive state and municipal prosecutions. The trial court and the Court of Appeals thus erred in applying the statutory double jeopardy provisions to this case.

2. The state contends that because violation of a municipal ordinance is not a crime under Code Ann. § 26-601 for statutory double jeopardy purposes, violation of a municipal ordinance is not a crime for constitutional double jeopardy purposes. We disagree. The constitutional guaranty that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb" cannot be defeated by statutory terminology. "The risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal punishment to vindicate public justice.'" Breed v. Jones, 421 U.S. 519, 529 (1975). Although the criminal code may deal only with violations of the laws of the state, violations of municipal ordinances are criminal offenses for constitutional purposes. See Pearson v. Wimbish, 124 Ga. 701(2) (52 SE 751)(1905). Because conviction of violation of a municipal ordinance subjects a person to stigma and punishment by incarceration or fine, Breed v. Jones, supra, a defendant prosecuted in a municipal court proceeding is in

"jeopardy" in the constitutional sense. Robinson v. Neil, 409 U.S. 505 (1973); Waller v. Florida, 307 U.S. 387 (1970).

3. The constitutional prohibition is against being twice placed in jeopardy for the "same offense." As the United States Supreme Court has stated, "The identity of offenses is, therefore, a recurring issue in double jeopardy cases." United States v. Ewell, 383 U.S. 116, 124 (1966).

"The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in Blockburger v. United States, 284 U.S. 299, 304 (1932): 'the applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . .'" Brown v. Ohio, 432 U.S. 161, 166 (1976).

We turn then to examine the proof required by the two offenses of which Burroughs was convicted. The municipal ordinance punishes a person "who by acts of violence interfere[s] with another's pursuit of a lawful occupation." We construe "acts of violence" broadly to reach not only violent action directed against persons, like assault or battery, but also violent action

directed against property if the result is that the action interferes with another's pursuit of a lawful occupation. Slashing the tires of the milkman's truck and cutting the water hose used by the firefighter are but two examples of violent acts directed against property which interfere with another's pursuit of a lawful occupation. Under this construction, proof of interference with another's pursuit of a lawful occupation is critical to proof of violation of Section 10 of the municipal ordinance. This element is, however, missing from the offense of simple battery. Simple battery requires proof of either intentional infliction of physical harm to another or intentional offensive contact with the person of another. The requirement of proof of physical harm or of offensive contact is wholly missing from the proof required for disorderly conduct. Thus, "each provision requires proof of a fact which the other does not," Brown v. Ohio, supra, and the two convictions do not impermissibly involve the "same offense" for federal constitutional purposes.

Appellant has asked that we disapprove Barker v. State, 146 Ga.App. 523 (246 SE2d 510)(1978), which upheld Barker's plea of former jeopardy to a simple battery prosecution under Code Ann. § 26-1304 following prosecution in municipal court for disorderly conduct. Barker is overruled insofar as it implies

that the statutory double jeopardy provision controls the issue of successive state and municipal prosecutions. We note, however, that the disorderly conduct ordinance punished "striking or attempting to strike another," which is essentially assault or simple battery. Thus, disorderly conduct was the same offense as simple battery, Brown v. Ohio, supra, for which successive prosecutions and multiple punishments are forbidden as a matter of federal constitutional law. Waller v. Florida, supra.

The opinion of the Court of Appeals which upheld appellee's double jeopardy claim is reversed.

Judgment reversed. All the Justices concur, except Hill, J. who dissents.

HILL, Justice, dissenting.

This defendant struck and kicked a policeman. For this he was convicted twice, once for disorderly conduct in municipal court and later for simple battery in state court. I dissent on the basis of Brown v. Ohio, 432 U. S. 161 (97 SC 2221, 53 LE2d 187) (1976), and In re Nielsen, 131 U. S. 176 (9 SC 672, 33 LE 118) (1889).

In Brown v. Ohio, supra, it was held that after a person has been convicted of one offense, the double jeopardy clause bars prosecution for a greater offense of which the first was a lesser included offense (unless additional facts have occurred or have been discovered). Specifically, the court held that conviction of the crime of joyriding precluded a subsequent prosecution for auto theft, joyriding being a lesser included offense under auto theft.

Subject to two decisional exceptions [Ashe v. Swenson, 397 U. S. 436 (90 SC 1189, 25 LE2d 469) (1970), and In re Nielsen, supra], the court in Brown reaffirmed the Blockburger test, to wit: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions,

the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . ." Brown v. Ohio, 432 U. S. at 166, quoting Blockburger v. United States, 284 U. S. 299, 304 (52 SC 180, 76 LE 306) (1932).

Brown v. Ohio, not Blockburger, is applicable here. The Atlanta Code proscribes the following as disorderly conduct: "Any person who shall by acts of violence interfere with another's pursuit of a lawful occupation. . . ." 1977 Atlanta Code of Ordinances § 17-3001.10.[1/] Our criminal code defines simple battery as follows: "A person commits simple battery when he either (a) intentionally makes physical contact of an insulting or provoking nature with the person of another or (b) intentionally causes physical harm to another." Code Ann. § 26-1304.

Here, oddly, simple battery is the "lesser offense" in that the crime of disorderly conduct requires proof of a fact that the crime of simple battery does not; to wit: interference with another's pursuit of a lawful occupation. However, aside from this difference, the crime of simple battery requires proof of no

/1/ Other provisions of the Atlanta Code, e.g., § 17-3001.1, make it clear that "acts of violence" as used in § 17-3001.10 are more than simple assaults.

fact that disorderly conduct does not. The "acts of violence" necessary to prove disorderly conduct were the same here as the intentional physical contact or harm necessary to prove simple battery. Hence, Brown v. Ohio bars reprosecution here.

Moreover, In re Nielsen, supra [the Blockburger exception], bars reprosecution here. Insofar as pertinent, Nielsen was living in Utah while it was still a territory and where Congress was suppressing polygamy. He was convicted in district court of the crime of cohabiting with more than one woman. Later he was convicted of committing adultery with one of the women he had been cohabiting with, it being alleged in the indictment that he was married to another woman. The Supreme Court found double jeopardy. In order to prove the crime of cohabiting, it was necessary to prove "living together", yet it was not necessary to prove "living together" in order to prove adultery. And, in proving adultery, it was necessary to prove that marriage to another existed, although it was not necessary to prove marriage to prove cohabiting. Thus, each crime required proof of facts that the other did not (living together in the one crime, and marriage in the other crime).

Even though the later Blockburger test was technically satisfied, double jeopardy nevertheless was found. This was so

because, in those successive prosecutions, the Court found sexual intercourse, living together and marriage to be elements of both crimes--adultery and cohabiting. That is to say, even where each crime requires proof of a fact that the other does not, double jeopardy attaches on a successive prosecution where each crime admits (and the state relies upon) proof of the disparate required fact as proof of the other required fact; i.e., the disparate facts of marriage to one person and sexual intercourse with another, albeit not required to prove unlawful cohabitation, were admissible as proof in the unlawful cohabitation case.

In the case before us, the proof of acts of violence (striking a policeman) in the disorderly conduct case (even if it could be said that such proof was not required in the simple battery case) was admissible and was utilized as proof of intentional physical contact or harm in the later battery case, and thus the Nielsen principle was violated.

I therefore dissent on the grounds of Brown v. Ohio and In re Nielsen, supra.

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA 9/25/79

The motion for a rehearing was denied today:

Case No. 34916, The State v. Burbuy #1

Hill, S., Dissents

Yours very truly,
MRS. JOLINE B. WILLIAMS, Clerk

CITY OF ATLANTA

DEPARTMENT OF CLERK OF COUNCIL

STATE OF GEORGIA)
)
COUNTY OF FULTON)

CITY OF ATLANTA

I, OLIVIA D. PARKS, do hereby certify that I am the duly APPOINTED DEPUTY CLERK OF COUNCIL of the city of Atlanta, Georgia, and as such am in charge of keeping the Minutes of the City Council of the said City of Atlanta. I further certify that the attached is a true and correct copy of Section 17-3001 (Disorderly conduct) taken from the 1977 Code of Ordinances of the City of Atlanta, Georgia. Adopted by the Atlanta City Council July 5, 1977 and Approved by the Mayor of the City of Atlanta July 8, 1977;

all as the same appears from the original which is of record and on file in my said office.

GIVEN under my hand and seal of office this 26th day of October, 1978.

Olivia D. Parks
DEPUTY CLERK OF COUNCIL

10
A 20

TAKEN FROM THE 1977 CODE OF ORDINANCES OF THE CITY OF ATLANTA, GEORGIA

Section 17-3001 Disorderly conduct.

It shall be unlawful for any person within the corporate limits of the city to violate any of the following subsections of this section:

(1) Any person who shall act in a violent or tumultuous manner toward another whereby any person is placed in fear of safety of his life, limb or health; or

(2) Any person who shall act in a violent or tumultuous manner toward another whereby the property of any person is placed in danger of being destroyed or damaged; or

(3) Any person who shall cause, provoke or engage in any fight, brawl or riotous conduct so as to endanger the life, limb, health or property of another; or

(4) Any person who shall assemble or congregate with another or others for the purpose or with the intent to engage in gaming; or

(5) Any person who shall frequent any public place with intent to obtain money from other persons by illegal and fraudulent schemes, tricks, artifices or devices; or

(6) Any person who assembles for the purpose of engaging in any fraudulent scheme, device or trick to obtain any valuable thing in any place or from any person in the city, or who shall aid or abet therein; or

(7) Any person who shall accost or force his company upon any female or attempt to pick up any female; or

(8) Any person who frequents any place where gaming or illegal sale or possession of alcoholic beverages or narcotics or dangerous drugs is practiced, allowed or tolerated; or

(9) Any person who shall use "fighting words" directed towards any person who becomes outraged and thus creates a turmoil; or

(10) Any person who shall by acts of violence interfere with another's pursuit of a lawful occupation; or

(11) Any person who shall congregate with another or others in or on any public way so as to halt the flow of vehicular or pedestrian traffic and refuses to clear that public way when ordered by the city police or other lawful authority; or

(12) Any person who shall disrupt, by excessive noise or disorderly actions, the undisturbed activities of any institution of learning, house of worship, or any hospital; or

(13) Any person who shall throw bottles, paper, cans, glass, sticks, stones, missiles or any other debris on public property.

* * * * * * * * * * *

A 21

Supreme Court, U. S.
FILED
JAN 28 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5804

CHRISTOPHER BURROUGHS,

Petitioner

v.

STATE OF GEORGIA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

DARYL A. ROBINSON
Assistant
Attorney General

Please serve:

DARYL A. ROBINSON
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

I N D E X

Page

QUESTION PRESENTED. 1

STATEMENT OF THE CASE. 2

REASON FOR NOT GRANTING THE WRIT. 4

I. PROSECUTION FOR VIOLATION OF A MUNICIPAL ORDINANCE AND A VIOLATION OF STATE LAW, EACH DETERMINED BY THE SUPREME COURT OF GEORGIA TO BE A SEPARATE OFFENSE REQUIRING PROOF OF DIFFERENT ELEMENTS, DOES NOT CONTRAVENE FEDERAL CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY.

CONCLUSION. 8

CERTIFICATE OF SERVICE. 9

TABLE OF AUTHORITIES

Cases Cited: Page

Blockburger v. United States, 284 U.S. 299 (1932) 6, 7

Brown v. Ohio, 432 U.S. 161 (1977). 5,6,7

Garner v. Louisiana, 368 U.S. 156 (1961). 5

Iannelli v. United States, 420 U.S. 770, n. 17 (1975). 7

State v. Burroughs, 244 Ga. 288, ___S.E.2d___, (1979). 2,3

State v. Burroughs, 149 Ga.App. 183, 254 S.E.2d 144 (1979). 2,

Waller v. Florida, 397 U.S. 387 (1970). 4,6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5804

CHRISTOPHER BURROUGHS,

Petitioner

v.

STATE OF GEORGIA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

I.

Does prosecution for violation of a municipal ordinance and a violation of state law, each determined by the Supreme Court of Georgia to be a separate offense requiring proof of different elements, contravene federal constitutional prohibitions against double jeopardy?

STATEMENT OF THE CASE

Petitioner, Christopher Burroughs, was convicted of disorderly conduct[1/] in Atlanta Municipal Court. Thereafter, Burroughs was convicted in State Court of Fulton County of the offense of simple battery [2/] and refusal to disperse.[3/] The evidence giving rise to these convictions showed "that Burroughs and some friends were gathered on the street, that Burroughs refused to leave when asked to do so by a police officer and that he then hit and kicked the police officer." State v. Burroughs, 244 Ga. 288, ___S.E.2d___ (1979).

Petitioner moved to dismiss the proceedings in State Court of Fulton County on statutory and constitutional double jeopardy grounds. The trial court reserved ruling; following the trial Burroughs' conviction for simple battery was set aside. The state appealed and the trial court's ruling was affirmed by the Georgia Court of Appeals. State v. Burroughs, 149 Ga. App. 183, 254 S.E.2d 144 (1979). The Supreme Court of Georgia granted certiorari and reversed, finding that the two offenses in question were different offenses requiring different elements of proof.

[1/] Section 17-3001.10, Atlanta Code of Ordinances (1977). One "who shall by acts of violence interfere with another's pursuit of a lawful occupation" is guilty of disorderly conduct.

[2/] Ga. Laws, 1968 pp. 1249, 1281 [Ga. Code Ann. § 26-1304]: "A person commits simple battery when he either (a) intentionally makes physical contact of an insulting or provoking nature with the person of another or (b) intentionally causes physical harm to another. A person convicted of simple battery shall be punished as for a misdemeanor."

[3/] Ga. Laws, 1968 pp. 1249-1315 [Ga. Code Ann. § 26-2606]: "A person in a gathering who refuses to obey the reasonable official request or order of a peace officer or fireman to move for the purpose of promoting the public safety by dispersing those gathered in dangerous proximity to a fire or other emergency, is guilty of a misdemeanor.

Burroughs now petitions this Court for a writ of certiorari to review that decision of the Supreme Court of Georgia. State v. Burroughs, supra.

If necessary to address adequately the issue raised in this petition additional evidence will be recounted in subsequent portions of this brief.

REASON FOR NOT GRANTING THE WRIT

I. PROSECUTION FOR VIOLATION OF A MUNICIPAL ORDINANCE AND A VIOLATION OF STATE LAW, EACH DETERMINED BY THE SUPREME COURT OF GEORGIA TO BE A SEPARATE OFFENSE REQUIRING PROOF OF DIFFERENT ELEMENTS, DOES NOT CONTRAVENE FEDERAL CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY.

The sole question presented to this Court is whether Petitioner's prosecution for two offenses, determined by the Supreme Court of Georgia to be separate offenses requiring different elements of proof, twice places Petitioner in jeopardy. It does not.

As the Supreme Court of Georgia found, "[b]oth the municipal and state convictions were supported by the same evidence which established that Burroughs and some friends were gathered on the street, that Burroughs refused to leave when asked to do so by a police officer and that he then hit and kicked the police officer." 244 Ga. at 288. Although Petitioner had raised both statutory and constitutional double jeopardy objections, the state supreme court found "that Georgia's double jeopardy statute is inapplicable to successive municipal and state court prosecutions. Where successive municipal and state prosecutions are involved, a criminal defendant's rights are controlled solely by the State and Federal Constitutions." 244 Ga. at 289. Cf. Waller v. Florida, 397 U.S. 387 (1970). The court further found that "a defendant prosecuted in a

municipal court proceeding is in 'jeopardy' in the constitutional sense [citations omitted]." 244 Ga. at 290.

Having so determined, the state supreme court turned its attention to the crucial issue: are the two offenses in question identical or are they separate and distinct offenses? In his brief to this Court, Petitioner asserts that "the state crime is completely subsumed and contained in the city ordinance." (Petitioner's brief, pp. 6-7). This cannot be, for the Supreme Court of Georgia has interpreted state law and determined that the offenses are separate. The court held:

> . . .proof of interference with another's pursuit of a lawful occupation is critical to proof of violation of Section 10 of the municipal ordinance. This element is, however, missing from the offense of simple battery. Simple battery requires proof of either intentional infliction of physical harm to another or intentional offensive contact with the person of another. The requirement of proof of physical harm or of offensive contact is wholly missing from the proof required for disorderly conduct.

244 Ga. at 290-91. As this Court has often recognized, the final authority to interpret state law rests with state courts. See, e.g., Brown v. Ohio, 432 U.S. 161, 167 (1977); Garner v. Louisiana, 368 U.S. 157, 169 (1961).

In Brown v. Ohio, supra, a similar constitutional issue was presented. However, in Brown, the state appellate court "authoritatively defined the elements of the two Ohio crimes"

and determined that one was a lesser included offense. Id. at 167-68. In that regard, contrary to Petitioner's assertion, the same situation was not addressed in Brown; Brown involved a state court determination that even though one offense was a lesser included offense in a second, prosecution for both was proper because the offenses occurred on different dates. This Court held that such a single crime could not be divided into a series of "temporal. . . units." Id. at 169. The present case involves no such situation.

Neither is this case similar to Waller v. Florida, supra. In Waller, this Court held that prosecution in state court is barred when the defendant has been tried in municipal court for the same offense. Id. at 395. That is precisely what the Supreme Court of Georgia held in this case; indeed, that court relied upon Waller in determining that Burroughs had been placed in jeopardy in the federal constitutional sense by his prosecution in municipal court. Brown and Waller are similar to the present case in that each involved a question of double jeopardy; however, neither is dispositive of the issue presented in this petition.

In Blockburger v. United States, 284 U.S. 299, 304 (1932), this Court held:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. . .

The Blockburger test emphasizes the elements of the two crimes. Brown v. Ohio, supra, at 166. "If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . ." Brown v. Ohio, supra, at 166, quoting Iannelli v. United States, 420 U.S. 770, 785, n. 17 (1975).

Having determined as a matter of state law that the two offenses were separate offenses requiring different elements of proof, the Supreme Court of Georgia, applying decisions of this Court, found that " ' each provision requires proof of a fact which the other does not'. . .and the two convictions do not impermissibly involve the 'same offense' for federal constitutional purposes." 244 Ga. at 291.

As a matter of state law Petitioner was convicted of separate, distinct offenses; as a matter of state and federal constitutional law Petitioner has not been placed twice in jeopardy.

CONCLUSION

No sufficient reason having been presented, the petition for writ of certiorari should be denied.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

DARYL A. ROBINSON
Assistant
Attorney General

Please serve:

DARYL A. ROBINSON
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

CERTIFICATE OF SERVICE

I, Daryl A. Robinson, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent in Opposition upon Petitioner's attorney by depositing a copy of this Brief in the United States mail, with proper address and adequate postage to:

Mr. Lawrence T. Girard
Attorney for Petitioner
Suite 700
Lenox Center
3355 Lenox Road, N. E.
Atlanta, Georgia 30326

This 24th day of January, 1980.

Daryl A. Robinson

DARYL A. ROBINSON